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International Human Rights Requirements in the Workplace and its Reception in Malaysia

CHANDRA SEGARAN, V T

Room 209, 2nd Floor, Asia Life Building, Hale Street, P O Box 367, 30740, Ipoh, Perak Darul Ridzuan

This article highlights the core international instruments on human rights promulgated by the United Nations and International Labour Organisation. It also briefly explains the doctrine of obligations erga omnes and postulates the essential human rights requirements recommended for observance amongst the international community. An analysis is also provided on all the essential elements of these international human rights concerns and the extend of its reception in Malaysia with an overview of its observance in the plantation industry.

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Article 23

- i) *Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.*
- ii) *Everyone, without any discrimination, has the right to equal pay for equal work.*
- iii) *Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.*
- iv) *Everyone has the right to form and join trade unions for the protection of his interests.*

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

International Labour Organisation (ILO) Declaration of Fundamental Principles and Rights at Work (1988)

The ILO at its 86 session held in Geneva on 18 June 1988 adopted the above Declaration on the fundamental principles and rights at work.

The following principles were enshrined as fundamental principles and rights at work under paragraph 2 of the said Declaration:

- i) freedom of association and the effective recognition of the right to collective bargaining;
- ii) the elimination of all forms of forced labour or compulsory labour;

- iii) the effective abolition of child labour; and
- iv) the elimination of discrimination in respect of employment and occupation.

United Nations' Guiding Principles on Business and Human Rights (2011)

The United Nations' Guiding Principles on Business and Human Rights are a set of guidelines to protect, respect and remedy human rights infringements and concerns arising in business enterprises.

The following are some of the foundational principles laid down in the Guidelines for business enterprises to adhere to in respecting human rights in the workplace:

Principle 11

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Principle 12

The responsibility of business enterprises to respect human rights refers to international recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.

Principle 13

The responsibility to respect human

rights requires that the business enterprises:

- i) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;*
- ii) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.*

Principle 14

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impact.

Other International Instruments

In addition to the above universal instruments on human rights, the following are some of the other international instruments which address human rights concerns in respect of specific categories of individuals.

- i) International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR),
- ii) Convention on the Elimination of All Forms of Discrimination Against Women (1979) (CEDAW),

- iii) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990),
- iv) Convention on the Rights of Persons with Disabilities (2006),
- v) United Nations Declaration on the Rights of Indigenous Peoples (2007), and
- vi) International Labour Organisation Convention on Termination of Employment 1982 (No.158).

BINDING EFFECT OF INTERNATIONAL HUMAN RIGHTS DECLARATION

Although it has generally been regarded that the Universal Declaration of Human Rights (UDHR) is not legally binding, but it does have strong moral force.

Situation in Malaysia

In Malaysia, the courts generally do not regard the UDHR to be a legally binding instrument because it is merely a statement of principle. In the case of *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356, it was held that the UDHR is not a legally binding instrument.

Further, in the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449, it was held that a declaration is a resolution of the General Assembly of the United Nations and not a convention subject to the usual ratification and accession requirements for treaties.

The Court observed that by its very title it is an instrument which declares or sets out statement of principles of conduct with a view to promoting universal respect for and observance of human rights and fundamental

freedoms. It went on to say that since such principles are only declaratory in nature, they do not have the force of law or binding on member states.

However, some local legal scholars in Malaysia are of the view that some of the UHDR provisions may have gained the status of customary international law, which would then be binding in Malaysia. It is also the views of the authors that the courts should have determined whether an invoked UHDR provision is a material evidence of a custom binding on Malaysia (Hamid, 2012).

Concept of obligations *erga omnes*

On the other hand, and quite apart from the views of our courts, the International Court of Justice (ICJ) in the *Barcelona Traction* case (1970) introduced the concept of *erga omnes* obligations amongst the international community.

In the above case, the ICJ observed that some rights by their very ‘nature’ and ‘importance’ are rights that all States can be held to have a legal interest in their protection; simply put, they are obligations *erga omnes*. These are obligations that apply to the international community as a whole and not just individual states.

Elements of human rights in employment

Therefore, based on the concept of obligations *Erga omnes*, the universal human rights elements in the context of employment can be enumerated as follows.

- i) right to work,
- ii) right to just and favourable conditions of work,
- iii) right to minimum wages,
- iv) right to equal wages for equal work,
- v) right to be protected from discrimination,

- vi) right to join a trade union and participate in collective bargaining,
- vii) right to be protected from unfair termination of employment,
- viii) right to privacy, and
- ix) right to be protected from all forms of forced or compulsory labour.

RECEPTION AND APPLICATION OF INTERNATIONAL HUMAN RIGHTS DECLARATIONS AND CONVENTIONS IN MALAYSIA

It should be noted that international treaties, declarations and conventions, in order to be applicable in any country, have to translated into domestic or local laws.

In Malaysia, Articles 74(1) and 76(1) of the Federal Constitution empowers the legislative arm of the Federation, the Parliament, to enact laws to implement domestically the international treaties, agreements, conventions or any decision of an international organisation of which Malaysia is a member. It must be made clear that any international instrument to which Malaysia is a signatory is not a Malaysian law until Parliament specifically enacts a legislation translating the contents of the international instrument into a Malaysian law. Only then can the Government implement and enforce the legislation containing the elements of the international instrument.

Malaysia has not ratified or directly adopted some of the international human rights conventions or declarations.

However, that does not mean that there are no existing laws in Malaysia governing human rights relating to employment and the workplace. On the contrary, there exist a plethora of laws in Malaysia which provides for human rights concerns in the workplace.

Our laws define “human rights” in section

2 of the *Human Rights Commission of Malaysia Act 1999 (Act 597)* as the fundamental liberties enshrined in Part II of the Federal Constitution. Subject to conditions stipulated therein, the following fundamental liberties are enshrined in the said Part of the Federal Constitution:

- liberty of the person,
- prohibition of slavery and forced labour,
- protection against retrospective criminal laws and repeated trials,
- equality,
- prohibition of banishment and freedom of movement,
- freedom of speech, assembly and association,
- freedom of religion,
- rights in respect of education, and
- rights of property.

Notwithstanding the above, human rights in general should be distinguished from employment-related human rights. Human rights in the workplace are those rights that specifically affect the wellbeing of employees and their expectation to function in a decent capacity as employees free from unfair terms and conditions of service.

A detailed analysis of the Malaysian perspective on the various international human rights concerns relating to employment and the workplace is provided below.

Right to work

The concept of 'work' can be construed as the provision of a service by an individual for and under the direction of another in return for remuneration. In this respect, the right to work enables an individual to earn a livelihood and thus provides him or her with an element of dignity in society. Nonetheless, it cannot be gainsaid that such a 'right to work' depends on

the availability of work. And as we know, availability of work is subject to many factors which could be beyond the control of the state, and thus there can be no guarantee of employment (Smith, 2014).

So although an individual has every right to work, but this right is subject to the control of external factors. Therefore, it is important to make a distinction between the 'right to work' and 'right to employment'. In this sense, it cannot be said that an individual has an absolute right to work; and for that matter, there is no such thing as an absolute right to work in any part of the world. From a realistic perspective, we are more inclined to say that the concept of 'right to work' would primarily embrace access to employment and freedom from forced labour.

In Malaysia, an individual's right to work is one of the fundamental liberties protected and enshrined under Part II of the Federal Constitution.

Right to just and favourable conditions of work

Basically, just and favourable conditions of work is a multifaceted concept encompassing basic standards of remuneration and conditions of employment such as wage period, working time, rest day, holiday, annual leave entitlement, sick leave entitlement, employees' standards of housing, safety and health at work and other conditions of employment (Smith, 2014).

In Malaysia, this right to just and favourable conditions of work is regulated by statute namely, the Employment Act 1955 (Act 265), Factories and Machinery Act 1967 (Act 139), Occupational Safety and Health Act 1994 (Act 514) and Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990 (Act 446).

Right to minimum wages

Article 7(a)(i) of the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) requires state parties to ensure that workers are entitled to minimum fair wages in respect of employment.

Although Malaysia has yet to ratify the above Covenant, but the Government has already promulgated minimum wages law for the private sector, and which law has been in force since 2012.

The statutory minimum wages rates therein have undergone several upward revision since its inception.

Right to equal pay for equal work

The ICESCR requires state parties to ensure that workers are entitled to equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work. As stated earlier, Malaysia has yet to ratify the above treaty.

Nonetheless, in terms of equality between male and female, Article 8(ii) of the Federal Constitution provides, amongst others, that there shall be no discrimination against citizens on the ground of gender in respect of any employment.

On the other hand, this concept of non-discrimination with regard to terms and conditions of employment between local employees and foreign employees has been given legislative effect through section 69L of the Employment Act 1955.

It is clear that the concept of “equal pay for equal work” is a derivative element of the broader concept of the right to non-discriminatory practices. Being as such, we would say that this right of “equal pay for equal

work” is well enshrined in our legal system.

Right to be protected from discrimination

In the context of the workplace, Article 8(2) of the Federal Constitution *inter alia* clearly and specifically states that there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in respect of any profession, vocation or employment.

The above provision, which delineates the right to be protected from discrimination, is a fundamental liberty accorded to all citizens of Malaysia under Part II of the Federal Constitution.

Right to join a trade union and participate in collective bargaining

Article 23(4) of the UHRD states that everyone should have the right to form and to join trade unions for the protection of their interests.

In Malaysia, there are no statutory restrictions whatsoever preventing any workman from joining a trade union or preventing him from participating in a collective bargaining.

The provisions under the Trade Unions Act 1959 (Act 262) and Industrial Relations Act 1967 (Act 177) permits any group of workmen to establish a trade union and to participate in union activities, including involvement in the collective bargaining process.

Right to be protected from unfair termination of employment

Article 4 of the International Labour Organisation Convention of Termination of Employment, 1982 (No. 158) articulates the following requirement.

“[t]he employment of a worker shall not

be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”

In Malaysia, provisions contained in Act 177 provides protection to a workman from arbitrary termination or dismissal from employment. Under section 20 of the Act, where a workman considers that he has been dismissed from employment without just cause or excuse by his employer, he may make representations to the Director General of Industrial Relations to be reinstated in his former employment.

Right to privacy

In Malaysia, all matters pertaining to the privacy of an employee with regards to the handling and processing of his or her personal data is regulated by stringent provisions contained in the Personal Data Protection Act 2010 (Act 709).

The Act imposes several obligations on the employer before personal data of the employees could be processed for employment and other incidental purposes thereto.

Right to be protected from all forms of forced labour

Article 4 of the UHRD stipulates that no one shall be held in slavery or servitude and the slave trade shall be prohibited in all their forms.

In addition to the above, Article 1 of the International Labour Organisation Forced Labour Convention, 1930 (No. 29) requires all members to undertake immediate measures to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.

It should be noted that in Malaysia, no

person shall be held in slavery and all forms of forced labour are prohibited under Article 6 of the Federal Constitution.

One of the indicators of forced labour is the retention of identity documents by the employer, with or without the consent of the employee concerned. In this connexion, it should be noted that in Malaysia the retention of identity documents of another is strictly prohibited under subsection 12(1)(f) of the Passport Act 1966 (Act 150).

Other indicators of forced labour such as withholding wages, excessive overtime, debt bondage, sexual violence and abusive working and living conditions are also prohibited in Malaysia under specific legislation such as the Employment Act 1955 (Act 265), Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990 (Act 446) etc.

In Malaysia, complaints regarding forced-labour, under the extended ILO indicators, mainly fall under the following areas.

- i) failure on the part of employers to provide suitable accommodation to foreign employees in accordance with the standards prescribed in Act 446,
- ii) retention of passports belonging to foreign employees by employers contrary to Act 150,
- iii) failure to initiate appropriate investigation or take appropriate action on complaints relating to sexual violence in the workplace, and
- iv) wrongful, unfair or unjust termination of the contract of service of an employee.

Offences under paragraphs (i) and (ii) above are generally treated as offences under the respective Acts, and are not specifically referred to as forced-labour in our local context.

There are virtually no recent reported cases on forced-labour on triable issues under paragraphs (i) and (ii) above simply because employers who are charged for violating the provisions of the afore-mentioned Acts usually admit to the charges and pay the fine imposed by the courts. In most such cases, the defensibility on the part of employers are considerably weak.

On the other hand, complaints of sexual violence in the workplace, although an indicator of forced-labour by ILO standards, are treated locally as serious misconduct by employers. In this respect, employers usually address such complaints through the statutory steps laid down under Part XVA of Act 265. Where the sexual violence has an element of criminality, the provisions of the Penal Code will accordingly apply, in which case it will involve the authorities.

As for wrongful, unfair or unjust termination of service, the affected employees have the right to redress their grievances and seek reinstatement through the statutory mechanism provided for under section 20 of Act 177.

HUMAN RIGHTS OBSERVANCE IN THE PLANTATION INDUSTRY

The elements of human rights discussed above are regulated by statute in Malaysia. Thus, employers in all industries are statutorily obligated to observe these requirements in toto, and the plantation industry is no exception.

However, it cannot be denied that some of the human rights provisions found in our local laws are ‘notoriously’ general in its construction. Being as such, it lends itself to different or restrictive interpretation by the stakeholders.

In the plantation industry, this lacuna in interpretation has been broadly curtailed by express and clear provisions in the collective agreements entered between the employers or employers’ association and the workers’

unions. Further, the plantation companies are also subject to mandatory compliance of the Malaysian Standards on Malaysian Sustainable Palm Oil (MSPO). These MSPO Standards too imposes stringent requirements on human rights in the workplace.

Plantation companies in Malaysia, being largely labour-intensive, are highly dependent on foreign employees. As such, a question may arise whether is there any distinction in employment matters between a local and foreign employee. In Malaysia, the law prohibits any form of discrimination between local and foreign employees with regard to the terms and conditions of employment.

Whilst the laws governing human rights in the workplace as discussed above are well provided for in Malaysia, however, the compliance part of it largely rests with the employers themselves.

One such important requirement which is not enthusiastically adhered to by some employers in the plantation industry is the adoption of a detailed human rights policy as required under the MSPO Malaysian Standards. The human rights policy requirement under Indicator 4.4.5.1 of the MSPO MS 2530-3:2013 and MSPO MS 2530-4:2013 reads as follows.

Indicator 4.4.5.1

The management shall establish a policy on good social practice regarding human rights in respect of industrial harmony. The policy shall be signed by the top management and communicated to the employees.

Thus, it is the management’s responsibility to ensure that the said human rights policy is translated into a workable instrument and effectively communicated to all employees in the workplace.

Human rights in the context of employment involves employees; as such, nothing protects their rights other than a detailed employment-related human rights policy and practice as enshrined in the above mandatory MSPO requirement.

CONCLUSION

An international instrument in the form of statement of principles such as a declaration does not require specific ratification by member states. On the other hand, if it is a convention, covenant or treaty, then it requires specific ratification by member states in order to be a binding instrument.

Although Malaysia has not ratified some of the essential international instruments on human rights with regard to employment and the workplace, but nonetheless, the requirements of the human rights concerns recommended in these instruments are extensively covered and protected through local laws.

In addition to the above, trafficking in persons and smuggling of migrants are also serious human rights offences in Malaysia under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670).

Therefore, it would not be wrong to say

that insofar as the rights of employees in Malaysia are concerned, they are well protected through local laws which are not less favourable in any manner than the international requirements recommended by the principal human rights instruments.

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